MALAYSIAN REPORTS

SIN SIANG HONG & ANOR. v. MAU YOON SWEE

[S.C. (Abdul Hamid Ag. L.P., Mohamed Azmi & Syed Agil Barakbah S.C.JJ.) October 15, 1984 and January 16, 1985]
[Kuala Lumpur – Federal Court Civil Appeal No 44 of 1981]

Land Law – Claim to land – Land purchased in 1948 but deed of sale not registered – Objection by administrators of estate of deceased vendor – Inquiry by Commissioner of Land Titles – Mutations in Titles to Land Ordinance (S.S. Cap. 126), s. 12(2) – National Land Code (Penang and Malacca Titles) Act, 1963, ss. 38, 53 & 54.

In this case the respondent claimed that he bought a piece of land in Malacca in 1948. A sale agreement was made but was lost. The Bill of Sale was not registered. As the vendor refused to register the transfer the respondent made a statutory declaration claiming for pre-existing title for 22 years. The respondent filed a claim with the Commissioner of Land Titles under section 53(1)(a) of the National Land Code (Penang and Malacca) Titles Act, 1963. The administrators of the deceased vendor filed an objection against the claim. The Commissioner held an inquiry. At the conclusion of the inquiry he held that the respondent had a pre-existing interest in the disputed land and he entered the name of the respondent as proprietor in the Interim Register. The administrators of the estate of the deceased vendor, the appellants, appealed to the Land Titles Appeal Board, which allowed the appeal. The respondent then appealed to the High Court in Malacca, which allowed the appeal and restored the Commissioner's order. The appellants appealed.

Held: (1) the claim of the respondent is founded purely on the 1948 purchase of the land and there could be no question of a claim on adverse possession;

(2) the findings of fact by the Commissioner that the respondent had purchased the land in 1948 were accepted by the Appeal Board and by the High Court and there was no reason to disturb them.

(3) notwithstanding the provisions of section 38(1) of the National Land Code (Penang and Malacca Titles) Act, 1963, the respondent was entitled to make the claim under section 53(1) of the Act if he could satisfy that (a) immediately before January 1, 1966 he had a pre-existing interest in a holding in respect of which no corresponding replacement title or interest is entered in the Interim Register or (b) that any replacement title or interest entered in the Interim Register had been entered wrongly or in error or has been extinguished by non-user or otherwise;

(4) the Commissioner is entitled to consider oral as well as documentary evidence of the claimant and his witnesses, if any, to establish a pre-existing interest under section 53(1)(a) or to establish error in an interim register under section 53(1)(b) of the National Land Code (Penang and Malacca Titles) Act, 1963;

(5) there is nothing in the 1963 Act to say that the Limitation Ordinance should apply to a claim under section 53(1) of the Act nor is there anything in Part IV of the Act to preclude a purchaser from making a claim to the Commissioner;

(6) in this case the respondent's name has been correctly entered by the Commissioner as proprietor in the interim register.

Case referred to:

(1) *Ejas Ali Qidwai* v. *Court of Wards, Balrampur Estate* A.I.R. 1935 P. C. 53; 154 I.C. 27.

SUPREME COURT.

F.H. D'Cruz for the appellant.
Anthony Fernandez for the respondent.

Cur. Adv. Vult.

Mohamed Azmi S.C.J. (delivering the Judgment of the Court): On October 31, 1974, the respondent Mau Yoon Swee (Mau for short) filed a claim with the Commissioner of Land Titles under section 53(1)(a) National Land Code (Penang and Malacca Titles) Act, 1963 in respect of a piece of land comprised in Lot 114, Town Area XXXVII Malacca, on which stood two houses known as No. 160 and No. 161, Ujong Pasir. During the British Military Administration in 1948, he claimed to have purchased the said land from Chew Chiang Seng (Chew for short) by sale agreement for $500/- (British currency). Chew died on July 30, 1971 without registering the Deed of Sale under the Mutations in Titles to Land Ordinance (S.S. Cap. 126). In his Form E claim, Mau mentioned the personal representatives of Chew as persons who might be involved with his claim. On October 17, 1975, through their solicitors Chew's widow (Sin Sian Hong) and his son (Chew Loke Ann) as administrators of the estate of Chew filed an objection against Mau's claim. In view of the conflicting claims the Commissioner exercising his power under section 33 entered an endorsement with the words "title not clear" in the Interim Register and proceeded to hold an enquiry under section 54(2) of the 1963 Act. At the conclusion of the enquiry held on March 29, 1976, the Commissioner was satisfied on the evidence before him, that Mau had a pre-existing interest in the disputed land, and he accordingly cancelled the endorsement "title not clear" and entered the name of Mau as proprietor in the Interim Register. The administrators of Chew's estate appealed to the Land Titles Appeal Board which allowed the appeal with costs on April 29, 1977 and entered the name of Chew in-

stead of Mau as the proprietor in the Interim Register. Mau then appealed to the High Court in Malacca against the order of the Appeal Board in reversing the Commissioner's order. The High Court allowed the appeal and restored the Commissioner's order in favour of Mau. The administrators of Chew's estate have now appealed to us against the said order of the High Court.

From Mau's Form E claim dated October 29, 1974 and as well as from submissions of counsel made before the Appeal Board and High Court, it is obvious that his claim to pre-existing interest in the land was based on the purchase of the land from Chew in 1948 or alternatively based on adverse possession. Mau set up his claim before the Commissioner in the following four paragraphs:–

"1. Some time before the Japanese Occupation I rented the house No. 160, Ujong Pasir, Malacca from the owner TAN SWEE PONG. The house No. 160 and another house No. 161 are erected on a part of the above land which was owned by a different person.

Later TAN SWEE PONG sold the two houses and I purchased them from the last owner, some time around 1943. I am still the registered owner of house No. 160 where I am still residing.

2, About two years after the British Occupation I purchased the said land from the then owner Chew Chian Seng for the sum of $500.00 in British currency and I was handed all the Title Deeds dating from 1899 in respect of the said land. A Sale Agreement was made but this Agreement is now lost.

3. Since the purchase of the said land I have been in undisturbed possession thereof and have been enjoying the rents and profits derived therefrom. I have been regularly paying the quit rent of the said land.

4. Some time in 1965 I was advised by friends to make a Statutory Declaration which I did to protect my rights and interest in the said land."

But we do not propose to dwell deeply on the argument of adverse possession since before us it has rightly been conceded by counsel for Mau that Mau's claim of "pre-existing interest" under section 53(1)(a) must necessarily be based on the 1948 purchase of the land from Chew and both on facts and law his claim cannot be based on adverse possession. In *Ejas Ali Qidwai* v. *Court of Wards, Balrampur Estate*[1], it was held by their Lordships of the Privy Council that the principle of law firmly established is that a person who bases his title on adverse possession, must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to a denial of his title to the property claimed, and that possession that is at its inception permissive must be shown to have become adverse by some subsequent change in its character. On the facts of the present case, Mau has never challenged the title of Chew. There has never been a denial of Chew's title to the property claimed. Indeed his claim of having purchased the land from Chew is a conclusive recognition of Chew's title to the land in dispute. As such the argument put forward in the High Court and the other two tribunals on behalf of Mau that the adverse possession was acquired through the 1948 sale has been abandoned. His claim is now founded purely on the 1948 purchase of the land itself.

In being satisfied that Mau had a pre-existing interest in the disputed land, the Commissioner, *inter alia*, made the following relevant findings –

(a) Land holding No. 114 T/A. XXXVII originally belonged to Chew who later sold the land to Mau during the B.M.A. for $500/– (British currency);

(b) The Bill of Sale was not registered with the Land Office because Chew (who died on July 30, 1971) refused to do so as he felt that the value of the land which he sold was too low;

(c) Unfortunately, the Bill of Sale was missing from the custody of Mau;

(d) As Chew refused to register the transfer of the said land, Mau made a Statutory Declaration which was registered with the Registry of the Land Office as Regd. No. 2892 of 1965, claiming for pre-existing title for 22 years.

The Appeal Board reversed the Order of the Commissioner on three points of law based on interpretation of certain provisions of the 1963 Act, S.S. Cap 126, and the Limitation Ordinance 1953. The Board did not seem to deal or interfere with the findings of fact made by the Commissioner that the land was sold by Chew to Mau for $500/– in 1948 and that Chew had refused to register the Deed of Sale before he died. In the circumstances, we see no reason to disturb the findings of fact made by the Commissioner and supported by the learned Judge regarding the 1948 sale notwithstanding the fact that the Statutory Declaration made by Mau on December 8, 1965 did not mention the said sale (see page 50 of the appeal record). We shall therefore confine ourselves to the three points of law raised by the Appeal Board on which Mau's claim had been rejected and the Commissioner's Order reversed.

With regard to the first point of law on the interpretation of section 38(2)(a) of the 1963 Act, the Appeal Board held that since the Act came into force on January 1, 1966 (*i.e.* the appointed day), a claim based on adverse possession could only be sustained if the claim was filed before that date. Sections 38(1), 38(2)(a) and 53(1)(a) provide –

"38. (1) On and after the appointed day no title or interest adverse to or in derogation of the replacement title or any replacement interest vested in the proprietor of any holding or in any other person pursuant to the provisions of this Chapter shall be acquired by any length of possession by virtue of the provisions of the Limitation Ordinance, 1953, or otherwise, nor shall such replacement title or replacement interest be extinguished by the operation of that Ordinance.

(2) Nothing in this section shall affect –

(a) the right of any person to make any claim (whether by virtue of adverse possession or otherwise) under section 53, or the due investigation and disposal of such claim;

53. (1)(a) Any person claiming that immediately before the appointed day he had any pre-existing interest in any holding in respect of which no corresponding replacement title or interest is entered in the Interim Register, may present to the Commissioner a claim in respect thereof in Form E."

Although the basis of claim on adverse possession has now been abandoned as a "pre-existing interest" for the purpose of Mau's claim under section 53(1)(a), the Appeal Board seemed to be of the opinion that because the claim was filed subsequent to January 1, 1966, it should be rejected. From the evidence there is no dispute that since March 15, 1945, the Title Deed to the land was registered in the name of Chew by Conveyance No. 614/05 dated March 15, 2605 (Japanese calendar) which is equivalent to March 15, 1945 – see page 53 of appeal record. But because of section 24, his title cannot be entered in the Interim Register, and under section 36 upon the appointed day, *viz* January 1, 1966, Chew's pre-existing interest in the land was extinguished and there should ordinarily be vested in him such corresponding interest in the holding created in relation to such land under the provisions of the Act and also he would be entitled to one of the four Replacement Titles as specified in section 39 as may be appropriate in relation to such holding under the provisions of Chapter IV. Under section 36, it is further provided that unless otherwise provided by the Act, every pre-existing deed relating to a holding shall, on and after the appointed day, have effect only as evidence of the nature and extent of any pre-existing interest in such holding. General incidence of Replacement Title until the titles have been declared indefeasible in accordance with Part VII is provided by section 37, and such Replacement Titles or interest shall be protected from adverse possession under section 38(1). From the evidence, it would appear that when Chew died on July 30, 1971, he had not obtained a "Replacement Title" or "replacement interest" which is defined under section 4(1) to mean a title or interest, as the case may be, in any holding to which any person is entitled under, and which has been entered, on the Interim Register in accordance with the provisions of Part IV. Thus, when Mau made and registered a Statutory Declaration regarding his interest in the land in December 1965 and followed by his claim in Form E under section 53(1)(a) filed on October 31, 1974, the Commissioner of Titles had in accordance with section 33 made an endorsement with the words "title not clear" in the folio of the Interim Register referred to earlier. It should be noted that Part IV of the Act is divided into three Chapters:–

Chapter 1 – General (section 35)
Chapter 2 – Creation of Replacement Title (sections 36–52)
Chaper 3 – Claims relating to Replacement Titles (sections 53–55)

In the circumstances, it is our view that the present case should come under Chapter 3, Part IV of the Act as there are two conflicting claims to the land holding which have to be determined by the Commissioner before a replacement title can be issued under Chapter 2. With respect to the Appeal Board and the learned High Court Judge, we do not think it is relevant to refer to the provisions of section 38 which is part of Chapter 2 and not Chapter 3. Section 38(1) expressly refers to "this Chapter" *i.e.* Chapter 2 which deals with creation of replacement title, and section 38(2)(a) makes it clear that nothing in section 38(1) shall affect the right of any person to make any claim (whether by virtue of adverse possession or otherwise) under section 53, or the due investigation and disposal of such claim. The Appeal Board's reliance on section 38(2)(a) in holding that a claim based on adverse possession could only be sustained if it arose before January 1, 1966 is therefore wrong if the word "arose" in the grounds of decision of the Board meant filing of the claim. Rejecting Mau's claim on the ground that the claim was filed only in 1974 is devoid of logic or law. Surely a claim whether by virtue of adverse possession or otherwise can only be made under section 53 after the Act had come into force on January 1, 1966. In our judgment Mau's application cannot be rejected because of section 38(2)(a). On the contrary, that sub-section preserves his right to make a claim under section 53 notwithstanding the provision of

section 38(1). Equally, the learned Judge erred in law in taking into consideration section 38(1) for the purpose of a claim relating to replacement titles under section 53(1). In our view, from January 1, 1966 notwithstanding the provision of section 38(1) any person can make a claim under section 53(1) if he can satisfy – (a) that immediately before January 1, 1966 he had a pre-existing interest in any holding in respect of which no corresponding replacement title or interest is entered in the Interim Register; or (b) that any replacement title or interest entered in the Interim Register has been entered wrongly or in error or has been extinguished by non-user or otherwise.

On the second point of law regarding the 1948 sale, the Appeal Board rejected the finding of the Commissioner on the ground that oral evidence ought not to have been admitted to prove the sale of the land to Mau by virtue of section 12(2) of the Mutations in Titles to Land Ordinance (S.S. Cap. 126). Section 12(2) provides:–

"No deed whatsoever for the sale or transfer of land shall be admitted to be valid by any officer of the Government, or be received in evidence as a legal instrument by any Court, unless the same has been registered in the office of the Registrar in the manner directed by this Ordinance."

On this issue the learned Judge disagreed with the Appeal Board and he dealt with the matter in the following way:–

"The Board's view was that since this section prohibited the admission of any instrument other than as prescribed therein, the Commissioner was not entitled to receive and consider the oral evidence on the fact of sale of the disputed land.

I do not agree with this narrow interpretation. Section 12(2) of the Mutation of Titles to Land Ordinance was not intended to restrict the types of evidence receivable by Court. Its purpose was merely to prohibit the use of improperly executed deeds for the transfer or sale of land as an *instrument* in Court.

In our present case, if the Commissioner based his finding solely on the instrument, then his finding must surely be wrong. However, he is not precluded from considering other oral evidence placed before him and if he finds the witness credible enough and accepts the evidence, I do not think it is proper for any Court of law to set it aside.

The Commissioner in this case has accepted the evidence of witnesses he had seen and heard and he gave some reasons in ground (vii) of his judgment why the Defendant should be disbelieved. I realise that the Commissioner's written decision was presented not exactly in the form this Court would have liked to receive it. I have therefore scrutinized the records of evidence to ascertain whether there are sufficient facts on which he could have arrived at his findings of fact. I am satisfied that he had before him evidence which, if accepted, would support his decision."

We are in entire agreement with the learned Judge's reasoning. In an enquiry held under section 54(2), the Commissioner is entitled to consider oral and as well as documentary evidence of the claimant and his witnesses (if any) to establish a "pre-existing interest" under section 53(1)(a) or to establish error in the Interim Register under section 53(1)(b). In our judgment, there was nothing in section 12(2) of S.S. Cap. 126 to prevent oral evidence from being admitted to establish a pre-existing interest through the 1948 sale. In any event, the whole of S.S. Cap. 126 was repealed with effect from January 1, 1966 by the 1963 Act except as provided by section 118. Under section 118(1)(a), the Ordinances repealed in the Fifth Schedule to the Act shall remain in force for the purpose of determining the nature and extent of any pre-existing interest, but provisions relating to admissibility of evidence are not within the saving provisions. Further, under section 4 of the 1963 Act, "pre-existing interest" includes any title acquired under any unregistered "pre-existing deed". Thus a person can acquire a pre-existing interest in land even from an unregistered pre-existing deed. In this case the Commissioner had accepted the fact that the land was sold to Mau in 1948 although the sale agreement was lost.

We now deal with the third and most crucial issue, namely, whether Mau had lost his pre-existing interest in the land immediately prior to January 1, 1966 by virtue of the 1948 sale being no longer enforceable under the Limitation Ordinance 1953 and as such he was not entitled to file a claim on October 31, 1974 under section 53(1)(a). The term "pre-existing interest" is defined in section 4 to mean, "all interests, rights, titles and estates (not being interests, rights, titles or estates vested in the Governor or the Government of the State) subsisting immediately before the appointed day in any land in the State, including any title therein acquired by adverse possession or operation of law or under any unregistered pre-existing deed." It is therefore clear from the statutory definition that to qualify as a "pre-existing interest", the interest, right, *etc.* in the land must be subsisting immediately before January 1, 1966. The issue to be determined is – Is Mau's interest in the land acquired through the 1948 sale still subsisting immediately before the appointed day? Before the Appeal Board, Mr. Low, counsel for Chew's estate, argued that, ".... even if there was an agreement for sale (which is lost now) the question is whether this is

a valid claim before the Commissioner. This is the wrong forum for specific performance. If specific performance is sought then the proper place to go for is the High Court. Even if it were to go to the High Court, it would be time barred". The Appeal Board in its grounds of decision agreed with Mr. Low's argument. Unfortunately, this third issue does not appear to have been considered by the learned Judge. It is the case for the legal administrators of Chew's estate that Mau had no "pre-existing interest" in the disputed land because even if it had established that the sale did take place in 1948, his claim to the land by purchase was barred by limitation by 1960 *i.e.* after a lapse of 12 years. Mau did nothing to enforce his right in the High Court for specific performance during the 12 years after the sale, and even if time were to run from 1951 *i.e.* 3 years after the sale when Chew refused to accompany Mau to the Land Office for execution of a proper transfer of the property, Mau's claim was time barred by 1963. If so even the Statutory Declaration made and registered by Mau in December 1965 would be out of time. It is therefore argued that in the absence of a pre-existing interest, Mau's claim to the land under section 53(1)(a) was misconceived. In our view the argument, though ingenious, is untenable. The National Land Code (Penang and Malacca Titles) Act, 1963 is intended to provide for the introduction of a system of registration of title to land in the States of Penang and Malacca, for the issue of replacement titles, for the assimilation of such system to the provisions of the National Land Code, and for matters incidental thereto. For these purposes the Commissioner of Land Titles is given wide powers not only under section 9 but also under sections 21, 25, 33 and 53. A "purchaser" as defined in the Act, namely "a person who in good faith and for valuable consideration acquires an interest in land, and includes a mortgagee, chargee and lessee", is entitled to make a claim before the Commissioner under section 53(1) for his name to be entered in the Interim Register on the basis of his pre-existing interest in any holding and such a claim relating to replacement title, unlike a claim for specific performance under the Specific Relief Act 1950 does not require the filing of a writ in the High Court. As such a claim under section 53(1) is unaffected by the Limitation Ordinance which in any event is concerned only with procedure and is not intended to extinguish any cause of action. Section 9(1) of the Limitation Ordinance merely provides that no action shall be brought by any person to recover land after the expiration of 12 years from the date on which the right of action accrued to him. There is nothing in the 1963 Act to say that the Limitation Ordinance should apply to a claim under section 53(1); nor is there anything in Part IV of the Act to exclude a purchaser from making a claim in Form E to the Commissioner. Indeed as stated earlier, section 38(2) provides that nothing in section 38(1) shall affect the right of any person to make any claim under section 53 whether by virtue of adverse possession or otherwise. Mau's claim relates to replacement title by virtue of the interest in land that he has acquired through the 1948 sale. His claim is not for specific performance of a contract of sale. The Commissioner was accordingly bound statutorily to entertain his claim and to hold an enquiry under section 54. In the circumstances, Mr. Low's argument that there was no valid claim before the Commissioner must be rejected. Under the 1963 Act, a claim relating to replacement titles must go before the Commissioner and not before the High Court. Accordingly, the second argument that the claim if initiated in the High Court would be time barred, does not arise. We are therefore of the view that the interest in the land acquired by Mau through the 1948 sale was subsisting immediately before January 1, 1966. The Limitation Ordinance would not extinguish such interest in land once the sale has been established. Further the 1963 Act makes a distinction between interest in land or holding, and title to any holding. For instance, in section 26(b) for purposes of preparing the Interim Register, the Commissioner shall not be required to deduce the title to any holding for a period of more than twelve years prior to the appointed day, or for a period extending further back than a grant or lease by the Crown or the State, whichever shall be the shorter. If it is the intention of the legislature to make applicable section 9(1) of the Limitation Ordinance to a claim by a purchaser under section 53(1), then it would have provided expressly in the Act that the Commissioner should not be required to entertain such claim where the sale had taken place more than 12 years prior to the appointed day. In the absence of a statutory provision to that effect, we hold the view that the argument advanced for the appellants regarding limitation must fail.

This appeal must therefore be dismissed with costs. In our judgment, Mau's name has been correctly entered by the Commissioner as proprietor in the Interim Register. We also order that the deposit be paid to the respondent on account of taxed costs.

Appeal dismissed.

Solicitors: *Thakurta & Low; Fernandez & Partners.*